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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 MARVIN DONIUS,

11 Plaintiff,

12 vs.
13 BO MAZZETTI; STEPHANIE
14 SPENCER; CHARLIE KOLB; DICK
WATENPAUGH; STEVE STALLINGS;
KENNY KOLB; DOE I AND DOE II,

15 Defendants.

CASE NO. 10cv591-WQH-POR
16 ORDER

17 HAYES, Judge:

18 The matters before the Court are the following motions filed by Defendants: Motion to
19 Dismiss Complaint (Doc. # 7); Ex Parte Application Requesting Judicial Notice of
20 Supplemental Authorities (Doc. # 14); and Ex Parte Application for Request for Judicial
Notice (Doc. # 15).

21 **I. Background**

22 This action concerns tribal regulation of non-Indian fee simple land located within the
23 boundaries of the reservation of the Rincon Band of Luiseno Mission Indians. Defendants are
24 tribal officials sued in their individual and official capacities. (Compl. ¶ 4, Doc. # 1).

25 On March 22, 2010, Plaintiff Marvin Donius initiated this action by filing the
26 Complaint for Declaratory Relief and for Injunctive Relief (“Complaint”). (Doc. # 1).

27 **A. Allegations of the Complaint**

28 In 1989, Plaintiff purchased property from Rincon Mushroom Corporation of America

1 (“RMCA”) which is located within the boundaries of the Rincon Band of Luiseno Mission
 2 Indians’ reservation. *Id.* ¶¶ 11, 12. In 1960, the property was “allotted and conveyed out of
 3 Tribal ownership by a Bureau of Indian Affairs fee patent.” *Id.* ¶ 10. The property is located
 4 in an open portion of the reservation across a San Diego County highway from the Harrah’s
 5 Rincon Casino & Resort. *Id.* ¶ 12. Plaintiff is not an Indian or a member of the tribe. *Id.* ¶ 8.
 6 RMCA is, and was at all relevant times, a California corporation comprised entirely of non-
 7 Indian shareholders. *Id.*

8 “[A]t least four years ago, and continuing to the present date, the Rincon Tribe ... and
 9 from time to time the Tribal defendants ... have devised, and have attempted to implement and
 10 effectuate, a plan ... to acquire ... ‘on the cheap’ [Plaintiff’s] five-acre parcel.” *Id.* ¶ 14. The
 11 plan “has included various efforts by these defendants to diminish and depreciate the value of
 12 [the] subject property.” *Id.* ¶ 15.

13 On March 15, 1960, the Rincon Tribe enacted Articles of Association, which state that
 14 the “Rincon Tribal Business Committee ... shall have jurisdiction over the lands within the
 15 boundaries of the Rincon Reservation.” *Id.* ¶ 19. “In ... April 2007, ... the Rincon Tribe
 16 enacted a Tribal Environmental Policy Ordinance that ... purportedly placed under the
 17 governmental jurisdiction of the Tribe the subject parcel, on the asserted basis that the Tribe’s
 18 regulatory authority extended to and included all land within the exterior boundaries of the
 19 Rincon Reservation.” *Id.* ¶ 20 (quotations omitted). “[T]he Rincon Tribe enacted an
 20 Environmental Enforcement Code that as revised on ... July 10, 2007 purported to extend tribal
 21 environmental regulatory authority over and as to [the] subject property, on the basis of the
 22 Tribe’s claim of such authority over all lands within the exterior boundaries of the Rincon
 23 Indian Reservation.” *Id.* ¶ 21 (quotations omitted). “On ... September 30, 2008, these
 24 defendants caused the Rincon Tribe to enact a Tribal Court Jurisdiction Ordinance that
 25 purported to claim regulatory as well as *in personam* and subject matter adjudicative
 26 jurisdiction over non-tribal member [RMCA], non-tribal member Donius, and as to subject
 27 non-tribal fee property, ... and also purports to extend the Tribe’s Territorial Jurisdiction over
 28 any fee lands within the external boundaries of the Rincon Reservation....” *Id.* ¶ 22 (quotations

1 omitted).

2 The first cause of action of the Complaint seeks a judicial declaration that “any
 3 prospective or future actual or attempted enforcement by these defendants of” the above-
 4 referenced Articles of Association, Tribal Environmental Policy Ordinance, Environmental
 5 Enforcement Code, and Tribal Court Jurisdiction Ordinance is “facially unconstitutional,
 6 unconstitutional as applied, and/or illegal, and/or entirely unenforceable, pursuant to applicable
 7 provisions of federal and California law, both with respect to plaintiff as well as concerning
 8 subject property.” *Id.* ¶ 23(a). “[P]laintiff contends that this Court should find, declare and
 9 adjudge that neither the Rincon Tribe nor the above-named Tribal defendants presently have,
 10 nor in the future could as a matter of law have, any regulatory or adjudicative authority of any
 11 nature whatever over or as to plaintiff and/or over or as to subject property....” *Id.* ¶ 23(d).

12 The second cause of action of the Complaint seeks the issuance of “a permanent
 13 injunction requiring and ordering that the above-named Tribal defendants desist and refrain
 14 from any further actual or attempted enforcement, prospectively and in the future, of any and
 15 all purported Rincon Tribe regulatory or adjudicative authority over or as to plaintiff and/or
 16 over or as to subject property.” *Id.* ¶ 29.

17 The Complaint does not seek monetary relief.

18 **B. Procedural History**

19 On March 14, 2010, Defendants filed the Motion to Dismiss pursuant to Federal Rules
 20 of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(7). (Doc. # 7). On May 14, 2010 and
 21 September 1, 2010, Defendants filed evidence in support of the Motion to Dismiss. (Doc. #
 22 7-9, 14-18). On June 7, 2010, Plaintiff filed evidence in opposition to the Motion to Dismiss.
 23 (Doc. # 10).

24 **II. Motion to Dismiss**

25 Defendants’ Motion to Dismiss is brought pursuant to Federal Rules of Civil Procedure
 26 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and
 27 12(b)(7) (failure to join a party under Rule 19). (Doc. # 7). A Rule 12(b)(1) motion asserting
 28 lack of subject matter jurisdiction may be either a facial attack on the sufficiency of the

1 pleadings or a factual attack on the basis for a court's jurisdiction. *See White v. Lee*, 227 F.3d
 2 1214, 1242 (9th Cir. 2000). "In resolving a factual attack on jurisdiction, the district court
 3 may review evidence beyond the complaint without converting the motion to dismiss into a
 4 motion for summary judgment." *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The
 5 court need not presume the truthfulness of the plaintiff's allegations." *Id.* (citing *White*, 227
 6 F.3d at 1242). However, "[j]urisdictional finding of genuinely disputed facts is inappropriate
 7 when the jurisdictional issue and substantive issues are so intertwined that the question of
 8 jurisdiction is dependent on the resolution of factual issues going to the merits of an action."
 9 *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983).

10 Motions pursuant to Federal Rule of Civil Procedure 12(b)(2) challenge personal
 11 jurisdiction. "When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff
 12 bears the burden of demonstrating that the court has jurisdiction over the defendant." *Pebble
 13 Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). A plaintiff must "make only a
 14 *prima facie* showing of jurisdictional facts to withstand the motion to dismiss." *Id.*
 15 "[U]ncontroverted allegations in plaintiff's complaint must be taken as true, and conflicts
 16 between the facts contained in the parties' affidavits must be resolved in plaintiff's favor."
 17 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010).

18 **A. Sovereign Immunity**

19 Defendants contend "tribal sovereign immunity bars Plaintiff's claims against tribal
 20 Defendants because plaintiff seeks relief against the Tribe." (Doc. # 7-1 at 11). Plaintiff
 21 contends that Defendants are not entitled to assert tribal sovereign immunity because the Tribe
 22 lacks regulatory jurisdiction over the land at issue, so all attempts to regulate the land exceed
 23 the scope of tribal authority. Plaintiff contends that the allegations of the Complaint that
 24 Defendants acted "under an authority not validly conferred" defeats sovereign immunity.
 25 (Doc. # 10 at 4-5).

26 "Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331
 27 to challenge tribal [] jurisdiction." *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d
 28 842, 846 (9th Cir. 2009). "Under the doctrine of *Ex Parte Young*, immunity does not extend

1 to [tribal] officials acting pursuant to an allegedly unconstitutional statute.” *Burlington*
 2 *Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Ex Parte*
 3 *Young*, 209 U.S. 123, 155-56 (1908)). “In determining whether *Ex Parte Young* is applicable
 4 to overcome the tribal officials’ claim of immunity, the relevant inquiry is only whether
 5 [plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief.” *Id.*
 6 (citation omitted).

7 Plaintiff has adequately alleged that Defendants were acting pursuant to an invalid tribal
 8 ordinance which exceeds the scope of the Tribe’s regulatory jurisdiction. The Complaint seeks
 9 prospective relief. Accordingly, Defendants’ motion to dismiss the Complaint based on
 10 sovereign immunity is denied. *See id.*; *see also Burlington N. R.R. Co. v. Blackfeet Tribe*, 924
 11 F.2d 899, 901 (9th Cir. 1991) (“[T]ribal sovereign immunity does not bar a suit for prospective
 12 relief against tribal officers allegedly acting in violation of federal law.”), *overruled on other*
 13 *grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

14 **B. Exhaustion of Tribal Remedies**

15 **1. Contentions of the Parties**

16 Defendants contend that Plaintiff was required to exhaust available tribal remedies
 17 before filing a federal court claim. (Doc. # 7-1 at 21-25). Defendants contend that “[t]he Tribe
 18 [has] colorable jurisdiction to regulate Plaintiff’s conduct under the Second *Montana*
 19 Exception. Plaintiff’s unregulated land use activities on his property pose fire and water
 20 contamination hazards that are demonstrably serious threats to the Tribe’s political integrity,
 21 economic security, or health or welfare.” (Doc. # 12 at 1).

22 Plaintiff contends that exhaustion is not required because it is clear that the Tribal Court
 23 lacks jurisdiction. Plaintiff contends that “*Montana* Exception Two as properly construed
 24 *totally proscribes* the exertion of any and all regulatory and/or adjudicative authority by the
 25 Rincon Tribe and/or by defendants as to plaintiff and his property.” (Doc. # 10 at 21).

26 **2. *Montana’s Second Exception***

27 Tribal governments have been divested of sovereignty over “relations between an
 28 Indian tribe and nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 564

1 (1981) (quotation omitted). Tribal governments have no jurisdiction over non-members
 2 “beyond what is necessary to protect tribal self-government or to control internal relations.”
 3 *Id.* Tribes have some authority to regulate nonmembers on tribal lands, but as a general rule,
 4 tribes may not regulate nonmembers on non-Indian land within the boundaries of the
 5 reservation. *Id.* at 564-65. There are two exceptions to that general rule; only the second
 6 exception is at issue in this case: “a tribe may exercise ‘civil authority over the conduct of
 7 non-Indians on fee lands within the reservation when that conduct threatens or has some direct
 8 effect on the political integrity, the economic security, or the health or welfare of the tribe.’”
 9 *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008)
 10 (quoting *Montana*, 450 U.S. at 565). This exception is “limited,” and “cannot be construed in
 11 a manner that would swallow the rule or severely shrink it.” *Id.* (quotations omitted). The
 12 conduct at issue “must do more than injure the tribe, it must imperil the subsistence of the
 13 tribal community.” *Id.* at 2726 (quotation omitted). “The burden rests on the tribe to establish
 14 one of the exceptions to *Montana*’s general rule that would allow an extension of tribal
 15 authority to regulate nonmembers on non-Indian fee land.” *Id.* at 2720.

16 **3. Exhaustion**

17 There is a general rule that if a non-Indian defendant is haled into a tribal court and
 18 asserts that the tribal court lacks jurisdiction, the defendant must exhaust tribal remedies before
 19 seeking to enjoin the tribal proceeding in federal court. *See Nat'l Farmers Union Ins. Co. v.*
 20 *Crow Tribe of Indians*, 471 U.S. 845 (1985). Even when there is no pending proceeding in
 21 tribal court, a nonmember plaintiff may not sue in federal court asserting that the tribe lacks
 22 regulatory authority over nonmember actions taken on non-Indian land within a reservation
 23 without exhausting tribal court remedies. *See Burlington N. v. Crow Tribal Council*, 940 F.3d
 24 1239, 1246 (9th Cir. 1991); *see also Sharber v. Spirit Mountain Gaming*, 343 F.3d 974, 976
 25 (9th Cir. 2003) (“The absence of any ongoing litigation over the same matter in tribal courts
 26 does not defeat the tribal exhaustion requirement.”). “Exhaustion is prudential; it is required
 27 as a matter of comity, not as a jurisdictional prerequisite.” *Boozer v. Wilder*, 381 F.3d 931,
 28 935 (9th Cir. 2004).

1 Plaintiff contends that “the *Strate* exception makes inapplicable the usual tribal court
 2 exhaustion doctrine.” (Doc. # 10 at 26). The “*Strate* exception” provides that exhaustion is
 3 not required “[w]hen ... it is plain that no federal grant provides for tribal governance of
 4 nonmembers’ conduct on land covered by *Montana*’s main rule,’ so the exhaustion
 5 requirement ‘would serve no purpose other than delay.’” *Nevada v. Hicks*, 533 U.S. 353, 369
 6 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60, n.14 (1997)).¹ When
 7 determining “whether it is plain that the tribal court lacks jurisdiction,” a court considers
 8 whether “jurisdiction is colorable or plausible.” *Elliott v. White Mountain Apache Tribal*
 9 *Court*, 566 F.3d 842, 848 (9th Cir. 2009) (“If jurisdiction is colorable or plausible, then the
 10 exception does not apply and exhaustion of tribal court remedies is required.”) (quotations
 11 omitted).

12 The Court of Appeals for the Ninth Circuit has held that “threats to water rights may
 13 invoke inherent tribal authority over non-Indians” pursuant to *Montana*’s second exception.
 14 *Montana v. U.S. Envir. Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998) (“*Montana II*”). “A
 15 tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on
 16 fee lands within its reservation when that conduct threatens or has some direct effect on the
 17 health and welfare of the tribe. This includes conduct that involves the tribe’s water rights.”
 18 *Id.* (quotation omitted). Similarly, tribes have a “strong interest” in “prevention of forest fires,
 19 and preservation of its natural resources” which could plausibly support tribal court
 20 jurisdiction pursuant to *Montana*’s second exception. *Elliott*, 566 F.3d at 850; *cf. id.* (“[E]ven

21 ¹ There is a second exception to the exhaustion requirement, which applies “when an
 22 assertion of tribal court jurisdiction is ‘motivated by a desire to harass or is conducted in bad
 23 faith.’” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009)
 24 (quoting *Nevada*, 533 U.S. at 369). In opposition to the Motion to Dismiss, Plaintiff has not
 25 contended that this exception is applicable, although Plaintiff’s Complaint alleges that
 26 Defendants “have attempted to implement and effectuate, a plan ... to acquire ... ‘on the cheap’
 27 [Plaintiff’s] five-acre parcel” (Doc. # 1 ¶ 14). Even if Plaintiff had properly raised the
 28 argument in opposition to the Motion to Dismiss, the evidence in the record is not sufficient
 to “prove[] that enforcement of the statutory scheme was the product of bad faith conduct or
 was perpetuated with a motive to harass.” *A & A Concrete, Inc. v. White Mountain Apache*
Tribe, 781 F.2d 1411, 1417 (9th Cir. 1986) (“This exception to the exhaustion requirement ...
 may not be utilized unless it is alleged and proved that enforcement of the statutory scheme
 was the product of bad faith conduct or was perpetuated with a motive to harass. No such
 proof appears in the record.”); *see also Elliott*, 566 F.3d at 847 (exception inapplicable because
 “there is no evidence of bad faith or harassment in the record”).

1 if we applied the two *Montana* exceptions without regard to the Supreme Court’s instruction
 2 that ownership of the land may be dispositive in some cases, we reach the same conclusion:
 3 In the circumstances of this case, we cannot say that the tribal court plainly lacks jurisdiction.”)
 4 (holding that it is not plain that a tribal court lacked jurisdiction over a nonmember for
 5 violating tribal regulations which prohibit setting a fire without a permit on tribal land).

6 Defendants have submitted evidence indicating that conduct on Plaintiff’s property
 7 “pose[] inherent threats to the shallow, unconfined aquifer which is the sole water source for
 8 the Tribe’s water system and Tribal member groundwater wells.” (Minjares Decl. ¶ 28, Doc.
 9 # 8-1). Defendants also have submitted evidence that “[c]onditions on the Subject Property
 10 during the [2007] Poomacha Fire contributed to the spread of wildfire from that property to
 11 Tribal lands across the street on which the Casino is located.” (Mazzetti Decl. ¶ 12, Doc. # 9;
 12 *see also* Allen Decl. ¶ 17, Doc. # 8). Although Plaintiff disputes this evidence, Defendants
 13 have shown that conduct on Plaintiff’s property plausibly could threaten the Tribe’s
 14 groundwater resources and could contribute to the spread of wildfires on the reservation. This
 15 showing is sufficient to require exhaustion, given the relief requested by the Complaint.

16 In the first cause of action, Plaintiff requests that the Court “declare and adjudge that
 17 neither the Rincon Tribe nor the above-named Tribal defendants presently have, nor in the
 18 future could as a matter of law have, any regulatory or adjudicative authority of any nature
 19 whatever over or as to plaintiff and/or over or as to subject property.” (Doc. # 1 ¶ 23(d)). The
 20 second cause of action seeks the issuance of “a permanent injunction requiring and ordering
 21 that the above-named Tribal defendants desist and refrain from any further actual or attempted
 22 enforcement, prospectively and in the future, of any and all purported Rincon Tribe regulatory
 23 or adjudicative authority over or as to plaintiff and/or over or as to subject property.” *Id.* ¶ 29.
 24 The declaratory and injunctive relief requested make no exception for “conduct [that] threatens
 25 or has some direct effect on the political integrity, the economic security, or the health or
 26 welfare of the tribe.” *Montana*, 450 U.S. at 565.

27 Given the breadth of the declaratory and injunctive relief requested by Plaintiff, there
 28 is a “colorable or plausible” claim to tribal regulatory and tribal court jurisdiction pursuant to

1 *Montana*'s second exception. *Elliott*, 566 F.3d at 848; *cf. Montana II*, 137 F.3d at 1141.
 2 Although *Montana*'s second exception should not "be construed in a manner that would
 3 swallow the rule or severely shrink it," *Plains Commerce Bank*, 128 S. Ct. at 2720, neither
 4 should it be construed in a manner that would eliminate the exception entirely. Because tribal
 5 court jurisdiction is plausible, "principles of comity require [federal courts] to give the tribal
 6 courts a full opportunity to determine their own jurisdiction in the first instance." *Elliott*, 566
 7 F.3d at 850-51. The Court concludes that Plaintiff must exhaust tribal remedies prior to
 8 asserting his claims in this Court.

9 The Court has the discretion to dismiss or stay this action while Plaintiff exhausts his
 10 tribal court remedies. *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948
 11 (9th Cir. 2008) ("As a matter of discretion, a district court may either dismiss a case or stay the
 12 action while a tribal court handles the matter.") (citing *Nat'l Farmers*, 471 U.S. at 857).
 13 Plaintiff has not asserted that the statute of limitations would bar Plaintiff from asserting his
 14 claims in a later-filed action post-exhaustion. *Cf. Sharber*, 343 F.3d at 976 ("[D]ismissal might
 15 mean that [plaintiff] would later be barred permanently from asserting his claims in the federal
 16 forum by the running of the applicable statute of limitations. Under the circumstances, the
 17 district court should have stayed, not dismissed, the federal action pending the exhaustion of
 18 tribal remedies."). Defendants' attempts to assert regulatory jurisdiction over Plaintiff and the
 19 property at issue are ongoing, and Plaintiff requests only prospective relief in the Complaint.

20 RCMA has filed an essentially identical Complaint against the same Defendants in
 21 another action pending before this Court, *Rincon Mushroom Corporation of America v.*
 22 *Mazzetti*, S.D. Cal. Case No. 09cv2330-WQH-POR. In *RCMA* action, issues have been raised
 23 concerning *RCMA*'s standing. If the Court dismisses each action, Plaintiff and *RCMA* (who
 24 are represented by the same counsel) will have the opportunity to refile any claims which
 25 remain after exhaustion in a single action, which potentially would eliminate any doubt
 26 regarding standing and would better conserve judicial resources. The Court finds that this
 27 weighs in favor of dismissal.

28 The Court takes judicial notice of the civil complaint filed against Plaintiff and *RCMA*

1 in the Intertribal Court of Southern California by the Rincon Tribe on July 30, 2010. (Doc. #
2 15-1, Ex. A). The complaint pending in Tribal Court raises issues related to the claims in
3 Plaintiff's Complaint in this action. The fact that there is a pending proceeding in Tribal Court
4 weighs in favor of dismissal of this action. *See Atwood*, 513 F.3d at 948 ("Because the parties
5 do not dispute that the ... issue is still pending before the Tribal Court, the district court
6 properly exercised its discretion and dismissed this case due to Plaintiff's failure to exhaust
7 tribal court remedies.").

8 The Court concludes that this action should be dismissed due to Plaintiff's failure to
9 exhaust tribal remedies.

10 **IV. Conclusion**

11 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss for failure to exhaust
12 tribal remedies is GRANTED. (Doc. # 7). Except as discussed above, the Court does not
13 reach the other issues raised by the Motion to Dismiss.

14 The Ex Parte Application Requesting Judicial Notice of Supplemental Authorities (Doc.
15 # 14) and Ex Parte Application for Request for Judicial Notice (Doc. # 15) are GRANTED.

16 The Clerk of the Court shall close this case.

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18 DATED: September 21, 2010

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20 **WILLIAM Q. HAYES**
21 United States District Judge

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